No. 89-1324

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

GANNETT CO., INC.,
Petitioner,
v.
STATE OF DELAWARE and
STEVEN B. PENNELL,
Respondents.

Petition for Writ of Certiorari
to the Supreme Court of the State of Delaware

Brief for Respondent Steven B. Pennell in Opposition to Petition for Writ of Certiorari

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DATED: April 11, 1990

QUESTIONS PRESENTED

1. Whether the decision of a trial court not to disclose to the public the names of prospective jurors during a jury selection proceeding in a criminal trial conflicts with decisions of this Court prohibiting closure of criminal trial proceedings, even though the entire jury selection proceeding was open to the public.

2. Whether the First Amendment presumptively requires the public announcement of the names of prospective jurors during a jury selection proceeding in a criminal trial, even though (i) no vital, enduring tradition calls for the public announcement of such names, (ii) disclosure of such names does not play a significant positive role in the functioning of the jury selection process, and (iii) the defendant and the prosecution support the trial court's judgment that public announcement of such names at that time would jeopardize the fairness of the trial.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Gannett Co., Inc., and Respondents the State of Delaware and Steven B. Pennell.

The Supreme Court of the State of Delaware appointed Steven J. Rothschild of the law firm of Skadden, Arps, Slate, Meagher & Flom to act as *amicus curiae* assisting the Respondents in the proceedings in that court. Pursuant to a further appointment by the Delaware Supreme Court, Mr. Rothschild represents Respondent Steven B. Pennell before this Honorable Court.

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Brief for Respondent Steven B. Pennell in Opposition to Petition for Writ of Certiorari

Respondent Steven B. Pennell respectfully asks this Court to deny the Petition seeking review of the order of the Supreme Court of the State of Delaware entered in this proceeding on November 13, 1989.

OPINIONS BELOW

The orders and opinions below are reprinted in the appendix to the Petition and the appendix to the Supplemental Brief in Support of the Petition. For the convenience of the Court,

the appendix hereto includes the March 2, 1990 unreported opinion and order of the trial court releasing the names of the jurors who served in the *Pennell* case.[1]

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

10 Del. C. § 4513(a):

> The names of persons summoned for jury service shall be disclosed to the public and the contents of jury qualification forms completed by them shall be made available to the parties unless the Court determines that any or all of this information should be kept confidential or its use limited in whole or in part in any case or cases.

A copy of the statute is included in the appendix to the Petition at A-1.

INTRODUCTION

The Petitioner asks this Court to review an order of the Delaware Supreme Court affirming a trial court's ruling that temporarily prohibited public disclosure of the names of prospective jurors involved in a jury selection proceeding in a

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[1] The Petition is cited herein as "Pet. at .''; the appendix to the Petition as "Pet. at A- .''; the appendix to the Petitioner's Supplemental Brief as "Pet. Sup. at A- .''; and the appendix to Respondent Pennell's Brief as "Pen. at A- .''.

sensational murder trial. By its ruling, the trial court preserved the public's First Amendment right to observe the entire jury selection proceeding. At the same time, the trial court protected, as this Court has directed it must, the right of the accused to a fair trial by an impartial jury.

The Petitioner claims, however, that this Court should establish a presumptive First Amendment requirement that the names of prospective jurors must be publicly announced at jury selection proceedings. The arguments in favor of such a rigid rule have been properly rejected by the Delaware courts and the other courts that have considered the question and do not merit further review in this Court. The trial court's ruling cannot properly be viewed as a constitutionally prohibited closure of the jury selection proceeding. Nor is there any historical or functional justification for the creation of a constitutional right to the public announcement of prospective jurors' names at *voir dire* at the expense of legitimate fair trial concerns.

This Court's cases have stressed the importance of enabling the public to observe judicial proceedings in order to ensure that persons accused of crimes are tried by jurors "fairly and openly selected." The jury selection proceeding under attack here was consistent with this principle. Each and every *voir dire,* including questions and answers on sensitive matters, was held up to public scrutiny. The Petitioner, like the rest of the public, was able to scrutinize every aspect of the proceeding.

Thus, the Petition has nothing to do with a right of access to jury selection proceedings. Rather, it concerns the Petitioner's attempt to gather personal information about prospective jurors, the disclosure of which is traditionally subject to the discretion of the trial judge. In Delaware, as in many other states and under Federal law, this discretionary authority is granted by statute.

Put in its proper light, the Petition should be denied for at least three reasons. First, the rulings below do not conflict

with the decision of this Court in *Press-Enterprise Co. v. Superior Court,* 464 U.S 501 (1984) ("*Press-Enterprise I*"), recognizing a qualified right of access to jury selection proceedings. As shown below, the trial court respected the First Amendment concerns articulated in that decision by ensuring that the public could scrutinize every aspect of the proceeding.

Second, the Delaware Supreme Court faithfully applied the tests of "experience and logic" set forth in *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) ("*Press-Enterprise II*"), in refusing to create a First Amendment right to the identity of jurors. The court found no common law tradition requiring announcement of the names of prospective jurors. Instead, recent Federal and state statutory history grants trial courts discretion in this regard. The court also found that disclosure of the jurors' names does not play a significant positive role in the jury selection process, particularly since the parties and the court, who had access to information about the jurors, are responsible for uncovering juror bias. In view of these findings, the court properly refused to find within the Constitution a presumptive requirement that jurors' names be publicly announced.

Third, there is no important First Amendment principle at stake that warrants review by this Court. As a practical matter, the ruling that the Petitioner seeks would invalidate every state and Federal statute granting trial court judges discretion in this regard, since a judge could rarely, if ever, meet the strict standards for closure of judicial proceedings. Also, since the trial court released the names of the seated jurors after the trial, its earlier ruling declining to publicize the names of prospective jurors should be viewed as no more than a reasonable time, place, and manner restriction on access to the information sought.

As set forth more fully below, the Petition should be denied.

STATEMENT OF THE CASE

1. The Underlying Criminal Proceeding

Respondent Steven B. Pennell was charged with three counts of first degree murder in November 1988. The deaths were alleged to be serial killings, and the State sought the death penalty. Autopsies of the three female victims revealed that they had been bound and tortured, their bodies mutilated. Because of the lurid nature of the crimes, the case received widespread publicity in the local and regional media throughout the investigation, pre-trial and trial proceedings.

Voir dire in open court began on September 11, 1989 and was completed on September 18, with the selection of a jury of twelve and six alternates. The trial, which local media described as the most sensational in Delaware history, see Pen. at A-2 n.1, commenced in late September and ended in mid-November.

2. The July 28, 1989 Administrative Order

During the spring and summer of 1989, the trial court conducted several open pre-trial hearings, including a suppression hearing and hearings relating to the admissibility of certain evidence. The trial judge grew concerned about the extensive publicity that the case was receiving and began to consider ways to prevent juror tampering and to ensure that the defendant would receive a fair trial. On July 28, 1989, the court entered an order addressed to the Prothonotary of the Superior Court of the State of Delaware (the "Order"), which states:

> In order to protect the integrity of the jury in this case, I am taking the following steps:
>
> 1. I direct the Prothonotary to keep confidential the names of all jurors subpoenaed for this jury panel. The jury information sheet will be available only to the attorneys for the parties. The names will not be released to anyone else.

> 2. On jury selection days those jurors who respond will be assigned a number from 1 to 100. Those numbers will be placed on the juror information sheets delivered to the attorneys and the Court.
>
> 3. All jury selection in open Court will be accomplished by numbers and not by names.

Pet. at A-2.

As the Delaware Supreme Court recognized, the Order was designed to preserve the confidentiality of information about prospective jurors at least until such time as an interested party, such as the Petitioner, sought access. Pet. Sup. at A-6.[2] While the Petitioner faults the trial court for issuing the Order without a prior hearing, that issue is not before this Court. Rather, the Petition asks this Court to review the trial court's September 11, 1989 decision to keep the Order in effect. Since that ruling was entered after a hearing and is supported by findings of fact and consideration of alternatives, the Petitioner's attack on the Order itself is a red herring.

3. The Trial Court's September 11, 1989 Bench Ruling

On Friday, September 8, 1989, after "discovering" what had been in the Prothonotary's publicly accessible file for over a month, the Petitioner filed a motion to intervene and vacate the Order. *Compare* Pet. at A-24 *with* Pet. at 3. The trial court agreed to hear the Petitioner's motions during the morning of Monday, September 11, immediately prior to the commencement of *voir dire.*

At the hearing, the State supported the Order, as did the defendant, thus raising Sixth Amendment concerns. Without waiving its argument regarding a right of access to the announcement of the names of all the prospective jurors at *voir*

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[2] The Petitioner's claim that the trial court failed to make the Order public in a timely manner is false. The trial court sent the Order to the Prothonotary's publicly accessible file on July 31, 1989. See Pen. at A-2. When the Petitioner first attempted to raise this non-issue in the Delaware Supreme Court, that court dismissed it in a footnote. Pet. Sup. at A-5 n.3.

dire, the Petitioner stated that it would accept, as a resolution of the matter, "release of the names and addresses of those jurors who are pulled to sit on the Pennell case, and certainly, not the jurors who . . . are not called or who are called and not seated." (Gannett App. Vol. 1 at A-106.)

Later that day, the trial court ruled from the bench denying the Petitioner's motion to vacate "at this time." Pet. at A-8. The ruling was based on at least two key findings. First, the court noted the "sensational press coverage" of the case, particularly in the days immediately preceding the hearing. Pet. at A-4, 7. The court found that, in light of the extraordinary publicity that the case had engendered, there was a "substantial likelihood" that persons would approach jurors and express unsolicited opinions to them. The court concluded that "the risk of [juror] contamination [was] great." Pet. at A-7.

Second, the trial court found that the "totally unprecedented" press coverage of jurors in a nearly contemporaneous murder trial in Delaware, *State v. Joyce Lynch,* had forced the court in the *Pennell* case to consider "what steps might be possible to protect the jury from potential interference, intimidation and loss of privacy." Pet. at A-5. In its written opinion of October 2, the court explained that the publicity that the Petitioner had directed at the individual jurors in the *Joyce Lynch* case was "without precedent in Delaware," and had resulted in the removal of one juror. Pet. at A-27, 28; *see also* Pen. at A-3 and n.3.

The trial court balanced the Petitioner's right to gather information against the interests of the defendant and the State in a fair trial and the privacy interests of the members of the public ordered to serve on this jury panel. Pet. at A-6. The court properly concluded that the Order was the "least restrictive step possible to protect the jury from potential interference, intimidation and loss of privacy." Pet. at A-5.

In view of the Petitioner's concession that its true interest was in learning the names of the seated jurors, the trial court provided the Petitioner, as well as the State and the defen-

dant, an opportunity to create a fuller factual record on the matter. Pet. at A-7. The trial court stated that it would promptly issue a written opinion on the motion before it and that it would also address in that opinion "the substantive issue as to seated jurors based upon the voir dire proceedings and any further argument or affidavits that any of the parties wish to submit to the Court. . . ." Pet. at A-7.

On September 18, 1989, after submitting affidavits in the trial court, the Petitioner took an interlocutory appeal to the Delaware Supreme Court from the September 11 bench ruling. See Pet. at A-5, 6. The Petitioner elected not to wait for the trial court to decide, on a supplemented factual record, the question of access to the names of *seated* jurors.

4. The Trial Court's October 2, 1989 Written Opinion

The trial court issued a written opinion on October 2, 1989 setting forth more fully the reasons for its September 11 bench ruling and declining, after considering the factual record submitted by the Petitioner and developed at *voir dire,* to vacate the Order as to seated jurors.[3]

In its October 2 opinion, the trial court rejected the argument that the propriety of the Order was to be measured by the constitutional standards applicable to closure of criminal proceedings. Pet. at A-31, 32 and n.3. However, assuming

[3] The timing of the Petitioner's appeal to the Delaware Supreme Court has created an ambiguity regarding the precise question that the Petition properly presents and the weight to be given the trial court's October 2 written opinion. While the trial court's September 11 bench ruling denies access to the names of the prospective jurors involved in the jury selection proceeding, the October 2 opinion speaks in terms of the Petitioner's request for access to the names of the *seated* jurors. Respondent Pennell suggests that, in view of the timing of the Petitioner's appeal, the Petition properly concerns only whether the First Amendment requires public announcement of the names of prospective jurors at a jury selection proceeding. The October 2 opinion should be considered to the extent that it constitutes the court's elaboration on its bench ruling, but not insofar as it deals with findings based on the *voir dire* or on the affidavits submitted by the Petitioner following the September 11 ruling.

that such standards could be applied, the trial court set forth the factors that led it to conclude that there was a "reasonable probability" that announcement of the jurors' names would prejudice the defendant's right to a fair trial. Pet. at A-32. The trial court noted, among other things: (i) the unprecedented coverage of jurors in the nearly contemporaneous *Joyce Lynch* murder trial, discussed above; (ii) the lurid and violent nature of the crimes, which had been the subject of heavy media coverage; (iii) the small population base from which jurors could be drawn; and (iv) the fact that the trial was expected to last 12-15 weeks and likely would cost approximately $500,000. Pet. at A-33, 34.

The trial court concluded that the Order was the least restrictive means to ensure the defendant's right to a fair trial and the jurors' privacy. The court considered, and rejected, several other alternatives, including postponement of the trial, change of venue, sequestration, and closing of *voir dire* when jurors were asked personal questions. Pet. at A-34–36.

Based on these findings, the trial court concluded that:

> the compelling interest of the defendant in having an impartial jury; as well as the privacy rights of the jurors; the State's right to a final resolution of this matter in this proceeding; and, the rights of over 100 witnesses to have this matter concluded at this time and without further proceedings require the order remain in effect.

Pet. at A-43.

5. The Delaware Supreme Court Affirms The Ruling Of The Trial Court

The Delaware Supreme Court issued an order affirming the trial court's decision on November 13, 1989 and issued a written opinion in support of its order on February 22, 1990.

In its written opinion, the Delaware Supreme Court noted, preliminarily, the trial court's affirmative duty under *Sheppard v. Maxwell,* 384 U.S. 333 (1966), to limit outside

influences on jurors "when extensive media activity threatens a party's fundamental right to a fair trial." Pet. Sup. at A-13. It also noted that, while this Court has recognized a qualified First Amendment right of access to criminal trials, jury selection proceedings, and certain preliminary hearings, "no court has yet recognized a right of access to jurors' names." Pet. Sup. at A-14.

In order to determine whether such a right exists, the court applied the two-part threshold test articulated in *Press-Enterprise II,* 478 U.S. at 8-9. Under *Press-Enterprise II,* the proponent of a qualified First Amendment right must demonstrate that (1) "the place and the process have historically been open to the press and general public" and (2) "public access plays a significant positive role in the functioning of the particular process in question." Pet. Sup. at A-14, 15; *Press-Enterprise II*, 478 U.S. at 8.

The court found that the Petitioner had satisfied neither part of the threshold test. As to the first part (the "experience" test), the court found no clear common law tradition requiring public announcement of jurors' names.[4] On the contrary, the court found that more recent statutory history affirmatively supports trial court discretion over the release of jurors' names. Among other things, the court noted that the Federal Jury Selection and Service Act, 28 U.S.C. § 1860 *et seq.,* enacted in 1968, permits Federal district court judges to keep the names of prospective jurors confidential "in any case where the interests of justice so require." 28 U.S.C. § 1863(b)(7).

The court noted that Delaware had enacted a similar statute authorizing Delaware trial courts to adopt a written plan for random selection of juries. 60 *Del. Laws* ch. 225, § 4504

[4] The court did not specifically address whether the precise issue before it concerned announcement of the names of prospective jurors at *voir dire* or seated jurors at trial. See note 3, *supra*, at 8. However, its analysis focused on the jury selection proceeding, as did the Petitioner's arguments. *See, e.g.,* Pet. Sup. at A-26 ("[a]t oral argument, Gannett claimed that announcement of juror names was the most important element of jury selection").

(1975). Pursuant to this statute, the Delaware Superior Court adopted a plan for random jury selection in New Castle County, which currently provides:

> Section 16. *Disclosure of Information About Jurors.* The names of qualified jurors drawn from the qualified jury wheel shall be made available to the public upon request *unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.*

Pet. Sup. at A-23 (emphasis added).

In 1987 Delaware again endorsed the concept of judicial discretion over release of jurors' names with the enactment of the Jury Selection and Service Act. 66 *Del. Laws* ch. 5, § 1 (1987). Section 4513 of that statute provides:

> The names of persons summoned for jury service shall be disclosed to the public and the contents of jury qualification forms completed by them shall be made available to the parties *unless the Court determines that any or all of this information should be kept confidential or its use limited in whole or in part in any case or cases.*

10 *Del. C.* § 4513 (emphasis added); Pet. Sup. at A-23. The court noted that this provision was modeled on virtually identical language contained in the Uniform Jury Selection and Service Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1970 and approved by the American Bar Association in 1972. Currently, at least eleven states, including Delaware, have adopted nearly identical provisions granting trial courts discretion over public dissemination of jurors' names. Pet. Sup. at A-23, 24.

In view of this statutory history, the Delaware Supreme Court rejected the Petitioner's claim that historical practice requires announcement of jurors' names. Rather, the court concluded that the historical tradition gives trial courts discretion over such matters. Pet. Sup. at A-25.

The court then turned to the second part of the threshold test: *i.e.,* whether public access to the jurors' names plays a "significant positive role" in the trial or selection of the jury.

Pet. Sup. at A-26. In rejecting the Petitioner's claim that the public plays a critical role in uncovering bias, the court found that the fairness of jury selection is protected by the participants in the litigation through juror qualification forms, individual *voir dire* of prospective jurors, and peremptory challenges. Pet. Sup. at A-27–29.

The court also rejected the Petitioner's claim that announcement of jurors' names promotes "the appearance of fairness." Given the extraordinary publicity that the Petitioner had so recently focused on the individual members of the *Joyce Lynch* jury, the court observed that, had the *Pennell* jurors' names been announced in court, the public perception would have been one of concern for the jurors and the extraneous influences upon them which the Petitioner's publicity invited. In sum, the court found nothing to suggest that the Order undermined public trust in the judicial system. Pet. Sup. at A-27–30.

Since the Petitioner had failed to establish a qualified right of access to the jurors' names, the Delaware Supreme Court reviewed the trial court's decision to keep the jurors' names confidential for abuse of discretion. Pet. Sup. at A-30. The court found that the coverage of jurors in the *Joyce Lynch* trial created legitimate concerns that jurors in *Pennell* might be improperly influenced by extraneous factors sufficient to endanger the defendant's right to a fair trial. The Order responded to those concerns in a reasonable manner without imposing the more onerous strictures of sequestration or closure of the courtroom. Therefore, the Delaware Supreme Court affirmed the judgment of the trial court. Pet. Sup. at A-31.

6. The Trial Court Grants The Petitioner's Post-Verdict Motion For Access To The Names Of The Seated Jurors.

On November 29, 1989, shortly after the jury returned its verdict in the *Pennell* case, the Petitioner filed a motion in the trial court requesting that the court rescind the Order and release the names of the jurors and alternate jurors who

served in the *Pennell* case. While the trial court rejected the Petitioner's argument that jurors have no post-verdict privacy interests, it found that continued confidentiality was not necessary to protect those interests. Therefore, it ordered that the names of the jurors and alternates be placed in the Prothonotary's publicly accessible files. Pen. at A-18.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE DELAWARE SUPREME COURT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The Petitioner claims that a writ of certiorari should be granted because the trial court ruling upheld by the Delaware Supreme Court is in direct opposition to the decisions of this Court recognizing a First Amendment right of access to criminal trials, most notably, *Press-Enterprise I*. However, as shown below, the decision of the Delaware Supreme Court does not conflict with *Press-Enterprise I* or any of this Court's cases. On the contrary, the Delaware Supreme Court's decision faithfully applies the tests of experience and logic set forth in *Press-Enterprise II* in reaching its conclusion that the First Amendment does not require public announcement of the names of jurors.

A. The Decision Of The Delaware Supreme Court Does Not Conflict With This Court's Decision In *Press-Enterprise I*.

The Petitioner has attempted throughout this litigation to cast its effort to gain information about the jurors as a request for access to the jury selection proceeding. This strategy is understandable, since *Press-Enterprise I* has established a qualified First Amendment right of access to such proceedings. However, as the Delaware Supreme Court ruled, it is "inaccurate to describe this as a closure case" since the "judicial proceedings, including *voir dire,* were never closed to the public." Pet. Sup. at A-12. As the Dela-

ware Supreme Court recognized, and as the Petitioner concedes, this case involves a "novel issue" of access to information about jurors. Pet. Sup. at A-11; Pet. at 10. The rulings below are in no way inconsistent with the decision of this Court in *Press-Enterprise I* or this Court's other cases concerning access to judicial proceedings.

Press-Enterprise I concerned whether a trial court could close to the public all but three days of a six-week *voir dire* proceeding and thereafter deny the public access to a transcript of the proceeding. In finding a qualified First Amendment right of access to jury selection proceedings, the Court considered the history of the jury selection process, which showed that, beginning in at least the 16th century, jurors were selected in public. The Court also considered the value of openness, which "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.*, 464 U.S. at 508. In particular, the Court noted that "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." *Id.* at 509. As to the appearance of fairness, the Court observed that " 'it is difficult for [people] to accept what they are prohibited from observing.' " *Id., quoting Richmond Newspapers v. Virginia,* 448 U.S. 555, 572 (1980). In light of these considerations, the Court ruled that the First Amendment right of access extends to jury selection proceedings and overturned the trial court's decision to close the proceedings and to deny the public a transcript of them.

While *Press-Enterprise I* concerned a denial of access to the jury selection process, the trial court's ruling in this case preserved public access to that process. Given this fundamental distinction, the Delaware Supreme Court properly determined that *Press-Enterprise I* was not controlling. Pet. Sup. at A-10, 11 ("[w]e thus confront the novel issue whether the news media have a qualified first amendment right of access requiring announcement of jurors' names during a crim-

inal trial"); Pet. Sup. at A-14 ("[t]he Supreme Court of the United States has recognized an implicit first amendment right of access to . . . the selection of jurors, [citing *Press-Enterprise I,* 464 U.S. at 508-09] . . . . To our knowledge, however, no court has yet recognized a right of access to jurors' names").

If the public announcement of the names of prospective jurors were a substantive part of the jury selection process, there might be some justification for regarding the trial court's ruling as having approved a partial closure of a jury selection proceeding. However, as discussed below, announcement of the names of prospective jurors—unlike the questions and answers during *voir dire*—does not serve a significant positive role in the jury selection process. Therefore, the decision of the Delaware Supreme Court should not be reviewed as contrary to *Press-Enterprise I* or any of this Court's other decisions concerning access to criminal proceedings.

B. The Delaware Supreme Court Properly Applied The "Experience And Logic" Tests Of *Press-Enterprise II*.

Because the case before it was not controlled by *Press-Enterprise I* or any of this Court's other precedents, the Delaware Supreme Court applied the test articulated in *Press-Enterprise II* to determine whether a qualified right of access to the names of prospective jurors should be recognized. Finding that the Petitioner had failed to establish either a clear tradition requiring public announcement of jurors' names or that such announcement plays a significant positive role in the trial or selection of the jury, the court properly ruled that no qualified right of access to the names of jurors exists.

With regard to jurors' names, the Delaware Supreme Court properly found that Gannett's historical sources "hardly support the type of strong national tradition recognized in other right of access cases." Pet. Sup. at A-20; *see Richmond Newspapers,* 448 U.S. at 589 (Brennan, J., concurring) ("the case for a [constitutional] right of access has special force

when drawn from an enduring and vital tradition of public entree to particular proceedings or information"); *In re Reporters Committee for Freedom of the Press,* 773 F.2d 1325, 1336 (D.D.C. 1985) ("we cannot discern an historic practice of such clarity, generality and duration as to justify the pronouncement of a *constitutional rule*. . . ." (emphasis in original)). Indeed, the theory of the jury at common law supports an historical tradition of judicial discretion as to disclosure of jurors' names. As the Court of Appeals for the Third Circuit has observed:

> The virtue of the jury system lies in the random summoning from the community of twelve "indifferent" persons—"not appointed till the hour of trial"—to decide a dispute, and in their subsequent, unencumbered return to their normal pursuits. The lack of continuity in their service tends to insulate jurors from recrimination for their decisions and to prevent the occasional mistake of one panel from being perpetuated in future deliberations. Because the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept.

Pet. Sup. at A-20 (quoting *United States v. Scarfo,* 850 F.2d 1015, 1023 (3d Cir.) (citation to Blackstone's *Commentaries* omitted), *cert. denied,* 109 S. Ct. 263 (1988)).

Examining more recent statutory history, the court found an affirmative, well-accepted practice of granting trial courts discretion with regard to the release of jurors' names. As set forth in the Statement of the Case, both the Federal Jury Selection and Service Act, 28 U.S.C. § 1860 *et seq.,* adopted in 1968, and numerous state statutes modeled on the Uniform Jury Selection and Service Act, promulgated in 1970, permit such discretion. In veiw of the widespread granting of judicial discretion in this matter, the court properly declined to establish a rigid constitutional rule that names of prospective jurors must be publicly announced during *voir dire.* Pet. Sup. at A-21–25.

Similarly, the court properly found that public announcement of prospective jurors' names did not serve a "significant positive role" in the jury selection process. With regard to the *voir dire,* the public interest in the administration of justice is protected by participants in the litigation. *See, e.g., Patton v. Yount,* 467 U.S. 1025, 1038 (1984) (*voir dire* is "the method we have relied on since the beginning" to identify bias); *Holland v. Illinois,* 110 S. Ct. 803, 809 (1990) (discussing the "assurance of impartiality that the system of peremptory challenges has traditionally provided"). The court properly rejected the Petitioner's forced argument that the press is a necessary adjunct to *voir dire* (but apparently only in newsworthy cases) performing the function of preventing juror dishonesty and ferreting out hidden biases. Pet. Sup. at A-27, 28.[5]

Nothing in the opinion of the Delaware Supreme Court is contrary to *Press-Enterprise I, Press-Enterprise II,* or any of this Court's First Amendment jurisprudence. On the contrary, the opinion faithfully applies the principles articulated by this Court.

II. THE DECISION OF THE DELAWARE SUPREME COURT DOES NOT RAISE AN IMPORTANT FIRST AMENDMENT QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

Having argued that the decisions of the Delaware courts are in "direct opposition to" this Court's precedents, Pet. at

[5] In view of the finding of the Delaware Supreme Court declining to find a qualified right of access to jurors' names, the court was not compelled to address the requirement of notice and a hearing or the "substantial probability" test articulated in *Press-Enterprise II.* Nevertheless, the court noted that, even absent a presumptive First Amendment right to the names of prospective jurors, "[t]he better course in the future would be for the trial judge to exercise his discretion on such an important matter only after giving the State and defendant an opportunity to be heard." Pet. Sup. at A-30 n.21. The court also made clear that the trial court would have been bound to apply the "substantial probability" test set forth in *Press-Enterprise II* had the threshold tests of "experience and logic" been met. Pet. Sup. at A-7, 8 and n.5.

9, the Petitioner then reverses its field and contends that the issue of access to jurors' names is "a novel issue that has yet to be clearly defined under the First Amendment." Pet. at 10. For the reasons stated above, we believe that the latter contention is correct. However, for several reasons, the "novel issue" that this case may raise is not an important question of First Amendment jurisprudence that merits review by this Court at this time.

Most importantly, since the trial court ensured that all substantive aspects of the jury selection proceeding were open to the public, the First Amendment values articulated in this Court's cases have been protected. Indeed, the Petitioner was free to report on the entire *voir dire,* including substantive issues relating, for example, to the prospective jurors' personal medical problems and their views on the death penalty. Pen. at A-12, 13.

Second, there is no indication that the discretionary authority held by trial courts in Delaware and in many other jurisdictions has been or will be abused.[6] The trial court here fairly balanced all of the interests at stake. Moreover, the opinion of the Delaware Supreme Court indicates that any future order of this kind will be carefully reviewed for abuse of discretion.

If this Court were to apply a strict closure standard to rulings of this kind, trial judges would be prevented from taking the kind of limited measure that was properly taken here in all but the rarest cases. Such a ruling would be an unwar-

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[6] Interestingly, the judge who ordered court personnel to keep jurors' names confidential in the *Joyce Lynch* case found such an order unnecessary in light of the circumstances surrounding the later trial of her husband and alleged accomplice, Richard Lynch. *See State v. Richard Lynch, Jr.,* Cr. A. Nos. IK88-02-0090-0097 (Del. Super. Ct. Oct. 3, 1989) (Gannett App. Vol. III, Exhibit F). In so ruling, he aptly noted, "[e]ach case must be examined and decided on its own facts, and the trial judge is in the best position to understand the circumstances of the individual case and the local ambience." *Id.,* slip op. at 4.

ranted restraint on the traditional authority of the trial court to manage trial proceedings so as to ensure a fair trial.

Finally, the impact of the ruling below is limited. The trial court did not resolve to keep the names of jurors confidential forever. *Cf. Press-Enterprise I,* 464 U.S. at 504-05 (trial court denied post-trial motion for release of transcript of jury selection proceeding). Here, the trial court granted the Petitioner's post-verdict motion that it release the names of the seated jurors.

To the extent that publication of jurors' names may enable the public to assure the proper functioning of the courts, post-verdict access to jurors' names satisfies that function. As the Court of Appeals for the Fifth Circuit has explained:

> The value served by the first amendment right of access is in its guarantee of a public watch to guard against arbitrary, overreaching or even corrupt action by participants in judicial proceedings. Any serious indication of such an impropriety, would, we believe, receive significant exposure in the media, even when such news is not reported contemporaneously with the suspect event.

United States v. Edwards, 823 F.2d 111, 119 (5th Cir. 1987) (upholding order sealing transcript of mid-trial *voir dire* until after trial); *see also United States v. Doherty,* 675 F. Supp. 719, 723 (D. Mass. 1987) (holding that public has a general right, "at some reasonable time after a verdict is delivered," to the names and addresses of jurors); *In re Reporters Committee,* 773 F.2d at 1337 n.9 (rejecting claim for First Amendment right to contemporaneous access to records in civil proceedings).

In sum, (1) the substantive aspects of the jury selection process were completely open to the public; (2) the trial court appropriately balanced the defendant's right to a fair trial with the public's desire for access to the proceedings; and (3) the trial court's ruling was limited in scope, and eventually resulted in the release of the names of the seated jurors when the trial ended. Under these circumstances, the decision of

the Delaware Supreme Court does not present an important question of Federal law that should be reviewed by this Court. Nor are there any other special or important reasons for granting the Writ. The Petition for a Writ of Certiorari to the Delaware Supreme Court should be denied.

CONCLUSION

For the foregoing reasons, Respondent Steven B. Pennell urges this Honorable Court to deny the Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware.

Respectfully submitted,

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DATED: Wilmington, Delaware
April 11, 1990

In the Superior Court

OF THE

State of Delaware
In and For New Castle County

State of Delaware,	)	
v.	)	Cr. A. Nos. IN88-12-0051-0053
Steven B. Pennell,	)	
Defendant.	)	

Date Submitted: December 14, 1989
Date Decided: March 2, 1990

OPINION

Upon Intervenor Gannett Co.'s post-verdict motion to vacate order. **GRANTED in part. DENIED in part.**

Peter N. Letang, Esquire and Kathleen M. Jennings, Esquire, and Jeffrey M. Taschner, Esquire of the Department of Justice, Wilmington, Delaware for the State.

Eugene J. Maurer, Jr., Esquire, Wilmington, Delaware for the defendant.

Richard G. Elliott, Jr., Esquire and David L. Finger, Esquire of Richards, Layton & Finger, Wilmington, Delaware for Intervenor Gannett Co.

GEBELEIN, Judge

The defendant in this action has been charged with three counts of First Degree Murder, in what was alleged to be serial killings. The autopsies of victims revealed that in two cases the victim had been struck in the head with a cylindrical object, such as a hammer, had been strangled, had suffered ligature marks on the wrists and ankles, had suffered injuries to the nipples from a pinching-type tool, such as pliers or a vise-grip, and had present the residue of duct tape in the area of the face and hair. The third victim, though not beaten in the head or strangled, had suffered removal of a nipple and bruises to her buttocks (similar to those found on one of the other victims). Finally there was evidence that she, too, had been bound hand and foot at the time of her injuries.

Because of the nature of these crimes and other murders or disappearances for which the defendant was not charged, the case received both national and local press coverage during the investigation as well as during pre-trial and trial proceedings. During the investigation, the local press published details of the crimes, speculated upon additional disappearances and gave warnings to women in the areas concerned. After the defendant's arrest, additional coverage occurred in the local press. A national television show broadcast details of the crimes and ran footage of the defendant's arrest. This coverage occurred upon local television as well.

Early in the prosecution of this case, Gannett sought access to search warrant applications and returns that had been sealed by Justice of the Peace Courts. With a limited exception, those files were opened to the press by this Court. The search warrant return deletion involving personal items of a sexual nature seized by the police from defendant's residence was released after the trial.

At the time of the suppression hearing in this case, March, 1989, the Court had become increasingly sensitive to the amount of media coverage generated by this unique case. Consideration was given at that time to closure of the suppression hearing; but, since the trial was six months away

and the Court anticipated that steps could be taken to provide an unbiased jury, the hearing was conducted in open Court. Additional daily news coverage followed. During the summer months, hearings were conducted relating to the evidentiary issues surrounding DNA identifications, again daily media coverage followed. These hearings, due to the schedules of expert witnesses, continued to the eve of trial. All of these pretrial proceedings were conducted in an open fashion, guaranteeing the public and the commercial media free access to all that occurred in this proceeding.

On July 28, 1989, this Court entered an administrative order directing the Prothonotary to keep confidential the names of jurors subpoenaed for the petit jury panel in this capital murder case.[1] The order was filed in the Prothonotary's file on July 31, 1989. In September 1989, Gannett Co., Inc., publisher of the *News Journal* (hereinafter, "*News Journal*" or "Journal"), moved to intervene and to vacate the order. After an open hearing on these motions, the Court ruled from the bench granting the motion to intervene and denying, at that time, the intervenor's motion to vacate the administrative order.

The bench decision was followed shortly by a written opinion which concluded that the juror's names were not public records to which the public had access; that the news media had no greater right of access than the public; and that the Court's discretionary authority to invoke confidentiality was permitted by statute and by the Plan of the Superior Court of Delaware for the Random Selection of Grand and Petit

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[1] The facts of this case, the pre-trial publicity surrounding it and the full text of the order are detailed in *Gannett Co., Inc. v. State,* Del. Supr., No. 372, 1989, J. Moore (February 22, 1990). Subsequent publicity included daily newspaper coverage and almost daily television and radio coverage. In addition, the case was the subject of several television special reports. The Courthouse was covered on almost a daily basis by live television and trial participants were routinely photographed going to lunch as well as arriving or leaving the Courthouse. The trial has been called the most sensational in Delaware history by the local news media.

Jurors.[2] *State v. Pennell,* Del. Super., Cr. A. Nos. IN88-12-0051-0053, Gebelein, J. (Oct. 2, 1989).

The Court also ruled that the case did not involve First Amendment freedom of press issues because the media had no right of access to these records and the order was not a prior restraint order because it did not prohibit the media from publishing anything, but rather prohibited Court personnel from divulging information. *Id.*

In deciding to keep the names confidential, the Court weighed such factors as the defendant's right to a fair trial, the pre-trial publicity, the possibility of harassment of jurors, the possibility that the jury could become contaminated or disqualified[3], and the jurors' privacy rights.

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[2] Ten *Del. C.* §4513(a) provides that, "The names of persons summoned for jury service shall be disclosed to the public and the contents of jury qualification forms completed by them shall be made available to the parties unless the Court determines that any or all of this information should be kept confidential or its use limited in whole or in part in any case or cases." The Plan of the Superior Court of Delaware for the Random Selection of Grand and Petit Jurors §16 incorporates the basic language of this statute.

[3] In particular the Court weighed the dangers of jury contamination or disqualification in the light of the experiences in *State v. Joyce L. Lynch,* Del. Super., Cr. A. Nos. IK88-01-0040-0047, Ridgely, J., where a juror had to be excused because of the impact of a *News Journal* article:

> (Juror No. 11 entered chambers.)
>
> THE COURT: Come in, Mr. Bloodsworth. Have a seat, please.
>
> BY THE COURT:
>
> Q. As you may know there has been a publication by the News Journal paper about information on the jury. I wanted to read to you a portion of the article as it relates to you, and then I will have some questions for you. It reads as follows, "Robert Lee Bloodsworth, 32, Harrington. Tall balding and thin. Has a three-year-old son and two-month-old daughter. He said that wouldn't affect his impartiality given the closeness of the ages of his children to those of the Gibsons."
>
> Will this publication affect your ability to be a fair and impartial juror in this case?
>
> A. Not to my knowledge, no.
>
> * * *
>
> JUROR NO. 11: If it would be possible I would like to go on record saying I am upset by it, in the context that my wife is afraid of getting crank phone calls and things of that nature.
>
> BY THE COURT:
>
> Q. Do you believe this would have any impact upon your ability to serve as a juror in this case?

The decision was appealed by the *News Journal* to the Supreme Court of Delaware, which affirmed the decision to keep the jurors' names confidential. *Gannett Co., Inc. v. State*, Del. Supr., No. 372, 1989, Moore, J. (Feb. 22, 1990).[4]

A. No, not really because we don't talk about it at home. This is the only time that she has mentioned the fact that she is upset by it.

Q. Because of the feelings that your wife has do you seek to be excused as a juror in this case?

A. If it is possible, yes.

* * *

MR. WERB: Your Honor, it would be defense counsel's position that based on the candor of the remarks of Mr. Bloodsworth that there is some serious concern with his ability to continue as a juror in this case. He has recited to the Court the concern, frustration and emotional upset his wife has experienced as a result of reading the contents of the article and in addition has expressed concern over the possibility of receiving crank phone calls, et cetera.

When questioned about whether or not he desired to continue in his capacity as a juror in this case he appeared without reluctance to indicate that if he could be excused that would be his desire and my concern with his tendered service as a juror in this case would lead one to the result that he could potentially be influenced or swayed by public opinion and sentiment as well as the feelings of his wife.

Two, there could be a possibility of a quick verdict or acting quickly to arrive at a verdict in this case so as to get this matter over and done with. I think in light of his responses it would be appropriate to have him excused from further service in this case.

MR. WHARTON: Your Honor, we really have no position with respect to his request. However, if the Court is inclined to excuse him I would suggest that the Court—I guess if he is excused he would be leaving. I don't know if he has any belongings to collect but if he has to return to the jury room he should be admonished not to discuss his concerns with anyone else.

(Juror No. 11 entered chambers.)

THE COURT: Have a seat, Mr. Bloodsworth.

JUROR NO. 11: Okay.

THE COURT: Do you have any belongings with you in the jury room today:

JUROR NO. 11: An umbrella.

THE COURT: All right. I am going to excuse you from further jury service in this case. I am going to admonish you not to discuss our conversations with any fellow jurors. You may go to the jury room, retrieve your umbrella and then leave the courthouse.

[4] The Delaware Supreme Court opinion concluded that no qualified First Amendment right of access exists in this case. *Gannett, supra* at 19.

The trial has now concluded. The defendant was found guilty of two counts of first degree murder, for which he was sentenced to two consecutive life terms. The jury could not reach a decision on the third count of first degree murder. The convictions have been appealed and the State is continuing its investigation on the third count, as well as other disappearances potentially linked to this defendant.

The *News Journal* now moves this Court to vacate the July 28, 1989 order and release the jurors' names. The *Journal* argues that the defendant's right to a fair trial is no longer implicated because the trial has ended; that the jurors have no post-verdict privacy rights; and that the *Journal* has a right of access to the list of names.

This Court previously concluded that the media's right of access is identical in scope to the rights of the general public. *State v. Pennell, supra* at 4. In that decision, the Court concluded that under the common law, which is codified as Delaware's Freedom of Information Act (FOIA),[5] and the statutory right of discretion to keep jurors' names confidential,[6] the records are not public records to which the public has access once the Court determines that the names should be confidential.

Because the media's right of access is no greater than the public's right of access, the names shall not be disclosed if "the Court determines that any or all of this should be kept confidential or its use limited in whole or in part. . . ." 10 *Del. C.* §4513(a). *See, United States v. Gurney,* 5th Cir., 558 F.2d 1202 (1977) *reh'g denied,* 562 F.2d 1257 (1977), *cert. denied sub nom. Miami Herald Pub. Co. v. Krentzman,* 435 U.S. 918, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978) (denying access to the names and addresses of jurors because the documents were not part of the public record).

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[5] 29 *Del. C.* §§10001-10005.

[6] 10 *Del. C.* §4513.

Except for the decisions dealing with this specific case, there is no case law interpreting 10 *Del. C.* §4513 and there is little legislative history. However, in enacting the Chapter on Jury Selection and Service, which includes that provision, the State legislature patterned the Delaware statutes after the Federal Jury Selection and Service Act, 28 *U.S.C.* §1861 *et. seq. State v. Robinson,* Del. Super., 417 A.2d 953, 956, n.1 (1980).

The Federal statute provides that in devising a written plan for selection of jurors the plan shall:

> . . . fix the time when the names drawn from the qualified jury wheel shall be disclosed to the public. *If the plan permits these names to be made public,* it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

28 *U.S.C.A.* §1863(b)(7) (West Supp. 1989) (emphasis added).

Similarly, the Delaware statute permits confidentiality at the Court's discretion and the Superior Court Jury Plan §16 provides that the names may be kept confidential if it is "in the interest of justice."

In requiring District Courts to adopt a plan with certain requirements, the Congress acted deliberately to provide the Courts with discretion. It said, "the plan approach is designed to provide a significant measure of flexibility so that localities may adjust the administration of jury selection to their particular needs." H. Rep No. 1076, 90th Cong., 2d Sess., *reprinted in* 1968 *U.S. Code Cong. & Admin. News* 1792, 1799 (hereinafter H.R. No. 1076). Likewise, the Delaware statutes on jury selection and service, which require a similar plan, were enacted to improve court efficiency. *See,* S.B. 46, 134th Gen. Assembly, Synopsis (Jan. 28, 1987) (amended and adopted without changing this provision, Feb. 17, 1987).

Specifically regarding the federal provision on release of jurors' names, the Congress said that the section allows each district to provide for disclosure of names, permitting the present diversity of practice to be continued. H.R. 1076 at 1801. It recognized that some courts keep jurors names confidential and other courts routinely publicize the names. *Id.*

Besides recognizing and allowing courts continued use of discretion in publicizing jurors' names, the Congress also recognized the administrative burden of preparing juror lists and noted that disclosure was not permitted routinely. H.R. No. 100-889, 66, 100th Cong., 2d Sess., *reprinted in* 1988 *U.S. Code Cong. & Admin. News* 5982, 6026[7] (hereinafter H.R. No. 100-889).

The Federal statute has now codified the common law practice of allowing Courts to determine if a list is required and provides that the list will not be disclosed except pursuant to the jury plan or for challenging compliance with selection procedures or after the master jury wheel is emptied and refilled. 28 *U.S.C.A.* §1864(a). Similarly, the Delaware statutes and jury plan leave disclosure decisions to the Court and do not permit disclosure of records except in accordance with the jury plan or as needed to challenge compliance. 10 *Del. C.* §4513(a) and (b).

In using its discretion to keep the names confidential, the Court cannot make its decision arbitrarily. *United States v. Tucker,* C.A. Ga., 526 F.2d 279 (1976) *cert. den.,* 425 U.S. 958, 96 S.Ct. 1738, 48 L.Ed.2d 203 (1976); *United States v. Stokes,* C.A. Ga., 506 F.2d 771 (1975) (although both of these cases related to situations where the defendant was entitled

[7] In amending 28 *U.S.C.* 1864(1) to exclude the requirement that the clerk or jury commission prepare an alphabetical juror list from the master jury wheel, the Congress said, "Many Courts report that no apparent good is served by the mandatory preparation of this list, in that it is rarely referred to and in fact is not permitted to be routinely disclosed. Furthermore, the preparation of this list is extremely burdensome, especially in those automated courts in which the master wheel itself is not alphabetized." H.R. No. 100-889 at 6026.

to access to the jury list, they noted that the standard of review for 28 *U.S.C.* §1863(b)(7) was whether the decision to withhold the names was arbitrary). Similarly, such discretionary decisions in Delaware cannot be arbitrary, without proper consideration of the facts and the law pertaining to the matter. Here, the law states that the jurors' names may be kept confidential if the Court so determines, 10 *Del. C.* §4513(a), and if it is in the interest of justice. Super. Ct. Jury Plan §16. Neither the Code nor the jury plan establish a particular time for the names to be released. This is consistent with the Federal law which recognizes that the time frame should be determined by the Court. It also is consistent with preventing an arbitrary decision because it allows the Court to consider the pertinent facts of each case to determine when or if the names should be released.

In this case, although the trial has concluded, the Court considers some of the same law and factors considered in its previous opinion. Even if the defendant's right to a fair trial is no longer implicated, the Court must recognize that jurors, who are members of the public, have privacy concerns that the Court will weigh. *State v. Pennell, supra* at 30.

> It is important that the public knows that their privacy may be respected so that they will readily participate when they are subpoenaed by the Court to fulfill their obligation. The public does not seek this duty; the Court demands it subject to contempt of court proceedings. . . .

Id.

This duty and service of the highest obligation of citizenship should be an interesting and rewarding experience to be looked back on with interest and pleasant recollection by those who are privileged to be selected. *United States v. Thomas,* 2d Cir., 757 F.2d 1359, 1365, n.1 (1985) (affirming decision to empanel anonymous jury).

The mere fact that a trial has ended does not mean that the criminal justice system should disregard any rights of these members of the public. If these rights are disregarded, the justice system can only add to the difficulties already experienced in getting prospective jurors to participate in the system, especially in a trial that is lurid and highly publicized.[8]

The *News Journal* states in its motion that jurors have no post-verdict privacy rights. This Court absolutely rejects this arrogant conclusion. First, the Delaware statute and the Superior Court Jury Plan establish no time frame in which the Court must release the names. Second, the history of jury *voir dire* in Delaware has been that while the jurors' names have been routinely announced, their privacy has been respected by having their answers to publicly asked questions taken at side bar, often with no record preserved of their answers. The historical fact is that in capital cases, many times some or all of the individual *voir dire* has been conducted in a jury room, *in camera*. *State v. Pennell*, *supra* at 18, n.6. Thus, Delaware has routinely recognized a juror's right to privacy as to personal information of a sensitive nature. Third, the legislative history of the Federal statute, which is similar to Delaware's, recognized that localities must have a significant measure of flexibility to adjust procedures to their particular needs. H.R. No. 1076, *supra* at 1799. By enacting legislation patterned after that statute, the State legislature created a similar measure of flexibility for this Court. Fourth, the United States Supreme Court has expressly recognized such rights in *Press-Enterprise Co. v. Super. Ct. of Ca.*, 464 U.S. 503, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (hereinafter, *Press-Enterprise I*).

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[8] Delaware, which has a small population base from which to draw jurors, is already experiencing difficulty in getting members of the community to participate. For example, in the *Pennell* case, more than 600 people were subpoenaed and less than 150 people reported. Of these, 106 prospective jurors were subjected to individual *voir dire* before a jury of twelve with six alternates could be empaneled. The Prothonotary's Office stated that this percentage of participation was not uncommon.

The *News Journal* cites one federal district court's opinion that "the court cannot assert a juror's privacy post-verdict." *United States v. Franklin*, N.D. Ind., 546 F. Supp. 1133, 1144 (1982). In *Franklin*, the defendant was charged with violating the civil rights of another man by attempting to shoot him. The trial involved some unique security problems to the court, its personnel, witnesses and the defendant himself. There was much national and local media attention. After a verdict of not guilty was returned, the Court advised the jury it had enjoined the participants and "all others" from attempting to interrogate the jurors about their deliberations or the reason for their verdict.

The media filed a motion to vacate the order and a writ of mandamus. While modifying the order to exclude the provision that enjoined "all others" from interrogating the jury about its deliberations, the Court said that the trial court "has the power to bring post-verdict interrogation of jurors under his control." *Franklin* at 1139 (citing *Miller v. United States*, 2d Cir., 403 F.2d 77 (1963)). While recognizing that it is "a general proposition [that] the Court cannot assert a juror's privacy post-verdict," *Franklin* at 1144, the Court, in its modified order provided that, "It shall be and remains the exclusive private decision of the members of this jury panel as to whether or not they desire to be interviewed regarding this trial by members of the press and the public." *Id.* at 1145.

In rendering its decision, the Court said that a major premise for its decision was that the defendant was acquitted. It said that whether their reasoning or result would apply to a criminal case where there was a conviction was reserved for another time. *Id.* at 1138.

In addition to the fact that the Court did not address the issue of what would occur if there had not been an acquittal, the Court based its decision solely on the impact such interrogation would have on jury deliberations and the authority of the Court to prevent post-verdict interrogation. It did not attempt to assert the jurors' right of privacy post-verdict. In

fact, it said it "had absolutely no intention of attempting to do so." *Id.* at 1144.

Since *Franklin,* a similar order was imposed on the media and the public. *United States v. Harrelson,* 5th Cir., 713 F.2d 1114 (1983) *cert. den. sub nom. El Paso Times, Inc. v. United States Dist. Ct. for the Western Dist. of Texas,* 465 U.S. 1041, 104 S.Ct. 1318, 79 L.Ed.2d 714 (1984). In *Harrelson,* the Court ordered that all persons were prohibited from approaching, questioning or interviewing any juror, or his relatives, friends or associates, concerning the jury's deliberations, except with leave of the court granted upon good cause shown. The court found that the jurors, even after completing their duty, are entitled to privacy and protection against harassment. *Id.* at 1118. The Appeals Court said that the trial court judge had not abused his discretion by ordering that "no person could make repeated requests for interviews or questioning after a juror has expressed a desire not be interviewed." It said that "common sense tells us that a juror who has once indicated a desire to be let alone and to put the matter of his jury service behind him by declining to be interviewed regarding it is unlikely to change his mind; and if he does, he is always free to initiate an interview." *Id.* The Circuit Court rationale is far more persuasive than that of the District Court Judge in *Franklin.*

Here, the jurors during *voir dire* were asked if having their names published by the press would preclude their ability to be fair. At that time, some of the jurors indicated that they did object to the publication of their names, but that they could be impartial. At the conclusion of the lengthy tiral, the jurors, having been exposed to the constant attendance of the media, unanimously told this Court that they did not wish the press to have access to their names.[9] The *News Journal* also reported that when the jurors were released and escorted outside that the jurors declined to comment on the case. One

[9] As noted in the Affidavit of the Chief Bailiff of the Superior Court, a Court's exhibit in this case.

alternate juror did speak, but declined to give his name.[10] The Court notes the jurors' response to its inquiry and to the media's questions after the verdict as indicating that the jurors do not wish to be interviewed.

While understanding the jurors' request for privacy, the Court must also consider the right of access of the press. It is well established that the press has no greater right than the public. The press and all others are free to report whatever takes place in the courtroom, but the particulars of jury deliberation are not available to the public or the press. *Harrelson* at 1118. *See also, Gurney, supra* at 1210-11. The reason for not making deliberations public is that, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Harrelson, supra* (citing *Clark v. United States,* 289 U.S. 1, 13; 53 S.Ct. 465, 468; 77 L.Ed. 993 (1933)).

In addition to the above concerns, the Court must also consider other impacts on the jurors' privacy that such release might have.

In the *Pennell* trial, the Court deviated from its routine procedure in capital cases and rather than announcing the names and then proceeding with some or all of the individual *voir dire in camera,* it withheld solely the names and juror questionnaires (with personal data) and allowed a completely open *voir dire.* In so doing, the jurors were asked personal questions ranging from educational background to positions on the death penalty. The press was free to print these answers. Some of the answers, if coupled with the names, could cause the jurors pain and embarrassment. For example, one juror was in a wheel chair and the Court had to inquire into his medical condition and how it might affect his ability to sit for long periods of time;[11] one juror testified that his brother

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[10] *News Journal,* Nov. 29, 1989.

[11] In reporting on this, the *News Journal* reported that no explanation was given for why he was in a wheelchair.

was accused of burglary and his case was pending in another state; another juror testified that his brother had been picked up for drunken driving.

These are personal matters about which the Court was required to inquire; and, that the jurors were required to answer, in order to provide the parties an opportunity to find a group of unbiased citizens to serve as jurors.

The United States Supreme Court has held that even when the Court determines that *voir dire* should be closed, it can satisfy the constitutional requirements of access to proceedings while safeguarding the juror's valid privacy interests, interests that the *Journal* argues do not exist. *Press-Enterprise I* at 512. In that opinion, the Court noted that one means to achieve this balance of rights would be to withhold a juror's name to protect the person from embarrassment. *Id.* at 513, 104 S.Ct. at 825.

Further, while the *News Journal* argues that because the case has ended, the defendant's rights are no longer implicated, there is authority which indicates that the status of the case should be weighed in determining if information should be released. *Nixon v. Warner Communications*, 435 U.S. 601, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). In *Nixon*, the Court upheld a decision precluding release of certain tapes to the media, holding that the common law right of access is one best left to the sound discretion of the trial court, to be exercised in light of the relevant facts and circumstances. It noted that the lower court had as a principal reason for refusing to release the tapes, fairness to the defendants, who were appealing their convictions. 435 U.S. at 602, n. 14; 98 S.Ct. at 1314, n. 14; 55 L.Ed.2d at 582, n. 14. In that case, the appeals were resolved before the Supreme Court made its decision. Here, the appeal is pending. Also, in this case, the jury did not acquit the defendant on one count of first degree murder; it could not reach a decision. The investigation into that count is continuing. Likewise, other charges may be initiated against this defendant. *See*, *United States v. Doherty*, 675 F.

Supp. 719, 724 (1987) (Sixth Amendment rights of the defendant are still vitally implicated).

The Court must also consider the potential for harassment that the jurors may experience if the names are released. *See*, *State v. Pennell*, *supra*, and cases cited therein; *Press-Enterprise I*, *supra*; *Harrelson* at 1118 (jurors, even after completing their duty, are entitled to privacy and to protection against harassment) (citing *In re Express-News Corp.*, 695 F.2d at 810); *Franklin* at 1139 (jurors ought not be subject to harassment) (citing *United States v. Crosby*, 2d Cir., 294 F.2d 928, 950 (1961), *cert. denied sub nom. Mittleman v. United States*, 368 U.S. 984 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962). On December 27, 1989, this Court held an evidentiary hearing on this motion. At that hearing a series of newspaper articles about the *Pennell* trial were entered as exhibits by the Court. Those reports show that the *Journal* referred to one juror in the case as looking "more like a mad killer than Pennell;" that a boyfriend of a woman whose disappearance had been linked to Pennell although he was not indicted on that count, had threatened that he had a gun and would come to the Courthouse; that the *Journal* had interviewed jurors whose names were released in another capital murder case occurring at approximately the same time;[12] and that one juror in that case had received several phone calls, on the day the verdict was returned, from friends astonished by the verdict. The attorney for Mr. Pennell testified that he had received threatening phone calls during the trial.

Other articles, not included at that hearing, reflect that friends and families of the victim whom Pennell was not convicted of killing are unhappy with the verdict. In one particular instance a family member of one victim whom Pennell was not charged with killing ran his own investigation of the crime, attended the court sessions everyday and had taken the victim's son to the prison, courthouse, and other perti-

[12] The article indicates that the press talked to one juror at least twice on the same day. It does not indicate who initiated the interview either time.

nent sites. That relative has expressed dissatisfaction with the jury's verdict, being quoted as saying, "I know he's guilty. I don't need 12 people up there going over things to let me know. He's guilty for five, not two." *News Journal*, "Killer's victims leave legacy of grief and anger", Nov. 29, 1989.

This Court has previously concluded that this case is not a First Amendment freedom of access case because the order is merely an administrative order, directing the acts of its own personnel pursuant to statutory authority. Further, it is not a prior restraint order prohibiting the publication of anything. *Gannett Co., Inc. v. State*, *supra*; *State v. Pennell*, *supra*; *Gurney*, *supra*. The withholding of jurors' names is not a form of closure of proceedings, as the *News Journal* argues.

The United States Supreme Court in *Press-Enterprise I*, *supra*, at 464 U.S. 512 specifically noted that in an appropriate case jurors' names could be withheld "to protect the person from embarrassment." The Chief Justice speaking for the Court questioned why the trial court did not "consider whether he could disclose the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Id.* at 513. Finally, as Justice Marshall noted in his concurring opinion:

> In those cases where a closure order is imposed, the constitutionally preferable method for reconciling the First Amendment interests of the public and the press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses.

Press-Enterprise, *supra* at 464 U.S. 521, 104 S.Ct. at 829.

Thus, the test in *Press-Enterprise I* is that, "Where the State attempts to deny the right of access in order to inhibit disclosure of sensitive information, it must be shown that the

denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."

Assuming that the *Press-Enterprise* standard would apply, the interests sought to be protected here have already been set forth. The State has an interest in protecting juror privacy, even after the trial—to encourage juror honesty in the future—that is co-extensive with the jurors' own privacy interests. *Press-Enterprise I, supra* at 517, 104 S.Ct. at 827 (Blackmun, J. Concurring). This State's interests, which concern the protection of juror deliberations and the possibility of harassment or embarrassment have been discussed above. Likewise, the Court has a compelling interest in preserving a jury system where jurors will willingly serve.

The Court also seeks to protect the rights that the defendant still has, which include not only his rights on appeal, but the protection of his rights in any subsequent trial. *Press-Enterprise I, supra*; *United States v. Doherty*, 675 F. Supp. 719, 724 (1987) (even though the trial of the specific individuals accused is over, the underpinnings of the jury system and the Sixth Amendment rights of the defendants—especially of the defendant who was acquitted—are still vitally implicated).

The pre-trial order in this case had been narrowly tailored to protect these interests. More restrictive means were considered by the Court and rejected. The Court could have issued an order similar to those cited above that absolutely preclude any persons from interviewing the jurors, their relatives, friends and associates post-verdict and subject them to penalties if they attempt to do so. *See*, *Harrelson*, *supra*; *see also*, Annotation, *Validity and Effect of Restraints on Postverdict Communication Between News Media and Jurors in Federal Case*, 93 A.L.R. 415 (1989).

The *Journal* has indicated that it is concerned that bias of jurors will not be reported if the names are not published. By allowing a completely open *voir dire*, which the press and the public attended daily, and by not prohibiting the media from photographing the jurors, the public and the press had the

opportunity to observe the jurors and report on biases uncovered. The media has advanced no other reason for wishing to publish the names; in fact, at oral argument it was suggested that the names might not even be published. It is curious to note that the role of the press in assuring a defendant an unbiased jury by publishing jurors' names and, thus, involving the public at large in jury selection attaches only in sensational murder trials. In all other criminal trials apparently such publication of jurors' names is unnecessary to assure unbiased jurors.

This Court concludes that it has the power in appropriate cases to withhold jurors' names post-verdict. For example, in a case where community reaction to the verdict is at a fever pitch; or, where community tensions are at an extremely high level, the release of jurors' names could prevent the jurors' return to their communities without severe harassment.[13] In

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[13] In such cases it is possible that fear of such results and the knowledge that their names would be disclosed could impact on the jurors' ability to deliberate fairly. As noted in *Gannett*, *supra*, at p. 52, n.3, Justice Walsh's dissent:

> The names of jurors were public at William Penn's trial in 1670 for inciting an unlawful assembly. For a summary of Penn's account of the trial, *see* W. Forsyth, *A History of Trial by Jury* 337-44 (2d ed. 1878). The jury persisted in finding Penn guilty of no crime, despite the judge's insistence that Penn was guilty. " 'Here some of the jury seemed to buckle to the questions of the court; upon which Bushel, Hammond, and some others, opposed assembly in their verdict. . . .' " *Id.* at 340. Finally, "[t]he court . . . commanded that every juror should distinctly answer to his name, and give in his separate verdict, which they unanimously did, saying, Not guilty 'to the great satisfaction of the assembly.' " *Id.* at 343.

In the William Penn trial, the publication of the jurors' names was ordered by the Court in an individual polling of their verdict in an *attempt* to coerce a "guilty verdict" – the very type of jury pressure that the American system of justice seeks to prevent.

> The notions of a jury of one's peers and of an impartial jury also developed during this period, but as exemplified in William Penn's trial, they were not quite what we consider

that case, the Court must be able to act to protect the jurors, and therefore, the jury system. Where the jury has actually been threatened as well as in many organized crime cases, the post-trial release of jurors' names could be physically dangerous to them. The Court again must be free to act to protect those jurors and the jury system.

In this case, despite the sensational publicity, the Court finds that a less restrictive act than continued confidentiality can protect the jurors' legitimate privacy interests. In this case, it is unlikely that the community will seek to harass or harm the jurors at this time. Likewise, the jurors' answers to *voir dire* questions including many of an extremely personal nature were made while identified by number. The jurors' names alone do not provide a connection to those sensitive or embarrassing answers. An alphabetical listing of the names of the eighteen jurors and alternates will be placed in the file in the Prothonotary's Office. The juror qualification forms and all records relating to the numbers assigned to individual jurors will not be discloded.

IT IS SO ORDERED.

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today." V. Hans and N. Vidmar, *Judging the Jury* 29 (Plenum, 1986).

In fact, at the time of the William Penn trial, jurors were usually selected by the Sheriff because of their bias toward the Crown. *Id.* at 29. Thus, while publication of jurors' names as a coercive force was recognized by English Common law, it has no place in the American jury system.